

No. 10-5296

IN THE
Supreme Court of the United States

ESTEBAN AYALA-SEGOVIANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

**REPLY IN SUPPORT OF THE PETITION FOR
A WRIT OF CERTIORARI**

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REPLY BRIEF**A. The Remand Does Not Affect the Question Presented.**

In its Brief in Opposition (“Opp’n”), the Government counsels this court to “postpone any review” of this case because of its posture. (Opp’n 6) But, while the case has been remanded, the remand was solely upon the issue of whether the two year term of supervised release could be tolled upon Petitioner’s expected deportation. Binding Circuit precedent said that it could not be tolled. Certainly, the District Court is not going to (and indeed cannot in light of the circuit court’s opinion here) give further consideration to the *Almendarez-Torres* question. The Sixth Circuit’s opinion is the law on this issue.

The Government does not suggest that the posture of this case has stripped the Court of its jurisdiction to hear the case, but takes a supervisory tone: “the Court should postpone any review...thereby permitting the Court to consider all of petitioner’s claims...in a single petition.” (Opp’n 6) The Government does not explain what issue is so grave as to warrant postponing consideration of an important issue that is ripe, and it does not explain how any future opinion of this Court might be affected by review of this issue in its present posture.

The Government’s postponement suggestion also may well afford it an unfair advantage. Likely Petitioner will have served his full sentence by the time the resentencing occurs and a further appeal is taken to the Sixth Circuit. Accordingly, there would be no practical relief available to Petitioner. See *United States v. Ohio Power Co.*, 353 U.S. 98, 99

(1957) (collecting cases) (“[I]nterest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules...both in civil and criminal cases.”). For this risk, no judicial economy will be gained because the Sixth Circuit has already ruled on the question of law presented here.

B. *Almendarez-Torres* Is Distinguishable.

The Government submits that the question presented here was resolved by *Almendarez-Torres* twelve years ago. The facts in *Almendarez-Torres v. United States* were easy facts because the defendant had already admitted his prior convictions. 523 U.S. 224, 227 (1998). This case presents the harder question of what happens when a defendant does not admit the existence or nature of the prior conviction. Here, no admissions were made at the plea hearing, at the sentencing hearing, in the Sixth Circuit, or in any of his briefs. Petitioner objected at sentencing to the enhancement based upon prior convictions and thus invoked both Fifth and Sixth Amendment rights relevant to such a determination.

The lone footnote in the Government’s Opposition requires a response. Here, the Government criticizes Petitioner for allegedly misinterpreting § 1326. (Opp’n 7). This criticism is undeserved. Section 1326 raises the maximum sentence for illegal reentry for aliens “whose removal was subsequent to a conviction for commission of an aggravated felony.” 8 U.S.C. § 1326(b)(2). The statute, thus, depends on the record of both the violator’s past felony conviction and the administrative removal proceeding because the enhancement is triggered only under a specific sequence of these events. The violation is not merely “[a] sentencing determination...dependent upon the

record of the prior criminal proceeding...not on the record of any administrative immigration proceeding.” (Opp’n 7)

C. Past Denials Of Certiorari Have No Relevance To Whether The Court Should Review This Case In The Present.

Finally, the Government cites a number of petitions that this Court has denied. The implied inference is that those denials are meaningful here. However, past denials of certiorari carry no weight in decisions of whether this Court should review this case because the denial of certiorari has no meaning. *United States v. Kras*, 409 U.S. 434, 461 (1973) (Marshall, J., dissenting).

Even if this Court imputed meaning to the denial of certiorari, the odd assortment of denials the Government compiles in its opposition would not be helpful in reviewing this case. The examples are petitions that broadly ask this Court to review *Almendarez-Torres*, but they do not seem to share much more. See e.g. *Styles v. United States*, 550 U.S. 906 (2007) (No. 06-8696) (questioning the scope of “crime of violence”); *Zavala-Alonso v. United States*, 2010 WL 2398711 (Oct. 4, 2010) (No. 09-11372) (challenging sufficiency of specific types of evidence to substantiate existence of prior crimes); *Rangel-Reyes v. United States*, 547 U.S. 1200 (2006) (Nos. 05-10743, 05-10706, 05-10815) (defendants in consolidated petition with no indication of common facts).

Justices have continued to call into question *Almendarez-Torres*'s continuing validity. Other courts have done the same.¹ Finally, *stare decisis* is a tool that allows a coherent canon of law to build around stable case law; it is not a tool for the judiciary to insulate bad cases from the assault of reasoned analysis, especially in cases involving the constitution. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–407, 410 (1932) (Brandeis, J., dissenting).

¹ The following cases are a sampling of the recent and continuing negative treatment, but dutiful obedience to *Almendarez-Torres*: “[t]hrough wounded, *Almendarez-Torres* still marches on and we are ordered to follow. We will join the funeral procession only after the Supreme Court has decided to bury it.” *United States v. Gibson*, 434 F.3d 1234, 1247 (11th Cir. 2006); [t]he Supreme Court has not yet sounded the death knell for recidivist sentencing laws” *Portolatin v. Graham*, 624 F.3d 69 (2d Cir. 2010) (en banc); “[t]he logical or rational disconnect between the holding in *Almendarez-Torres* and the basic underlying principles of *Apprendi*...cannot be denied.” *United States v. Pineda-Arrellano*, 492 F.3d 624, 631 (5th Cir. 2007) (Dennis, Circuit Judge, concurring), *cert. denied*, 552 U.S. 1103 (2008); “[j]ust as opera stars often go on singing after being shot, stabbed, or poisoned, so judicial opinions often survive what could be fatal blows.” *United States v. Booker*, 375 F.3d 508, 516 (7th Cir. 2004)(personifying *Almendarez-Torres*).

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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RULE 33.1(h) CERTIFICATE OF COMPLIANCE

No. 10-5296

Estevan Ayala-Segoviano,

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v.

United States of America,

Respondent.

As required by Supreme Court Rule 33.1(h), I, Jeffrey T. Green, certify that the Reply in Support of the Petition for a Writ of Certiorari in the foregoing case contains 995 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 2, 2010.



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CERTIFICATE OF SERVICE

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Respondent.

I, Jeffrey T. Green, do hereby certify that, on this second day of December, 2010, I caused one copy of the Reply in Support of the Petition for a Writ of Certiorari in the foregoing case to be served by first class mail, postage prepaid, on the following parties:

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